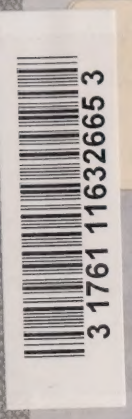

CRIMINAL TRIAL AND PUNISHMENT: PROTECTION OF RIGHTS UNDER THE CHARTER

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ISSUE DEFINITION

The *Canadian Charter of Rights and Freedoms* came into force on 17 April 1982. The legal rights guaranteed by the Charter are contained in sections 7 to 14 inclusive. They deal with such matters as the right to life, liberty and security; the right to be secure against unreasonable search and seizure; the rights of an accused upon arrest; the right of an accused to certain proceedings in criminal and penal matters; and the right not to be subject to cruel and unusual punishment.

The purpose of this analysis is to determine what effect sections 11, 12 and 13 of the Charter have had on existing criminal law since then. As there are now a great number of decided cases dealing with these sections, this paper will concentrate on significant decisions of the provincial courts of appeal and the Supreme Court of Canada.

BACKGROUND AND ANALYSIS

A. The Interpretation of an Entrenched Charter

When analyzing the decisions of the courts with respect to these sections, it is important to remember that the Charter is entrenched within the Constitution of Canada and that, by virtue of section 52(1) of the *Constitution Act*, 1982, "the Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."

It could be argued that two sections of the Charter illustrate a conscious attempt by its framers to restrain the Canadian courts from achieving the level of judicial activism which has been prevalent in the United States and to continue in some measure the Canadian heritage of parliamentary supremacy. Section 1 allows legislatures to impose reasonable limits upon rights and freedoms, while section 33 allows the legislatures to expressly declare that a statute may operate notwithstanding certain sections of the Charter.

In its decision in the *Southam* case, the Supreme Court of Canada indicated that "the task of expounding a constitution is crucially different from that of construing a statute." When considering the application of the Charter, it is important to recognize that it is a purposive document; that is, "its purpose is to guarantee and to protect within the limits of reason, the enjoyment of the rights and freedoms it enshrines. It is intended to constrain governmental action inconsistent with those rights and freedoms; it is not in itself an authorization for governmental action."

It is in this context of the contrast between the concepts underlying the Charter and the American Bill of Rights that this paper examines the legal rights protected by sections 11, 12 and 13 and discusses recent court decisions showing the impact of those sections on the criminal justice system.

B. Specific Rights: Section 11

This section states:

> 11. Any person charged with an offence has the right
>
> (a) to be informed without unreasonable delay of the specific offence;
>
> (b) to be tried within a reasonable time;
>
> (c) not to be compelled to be a witness in proceedings against that person in respect of the offence;
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

(e) not to be denied reasonable bail without just cause;

(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

(g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;

(h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and

(i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

1. "Charged with an Offence" - The Application of Section 11

In *R.* v. *Wigglesworth*, the Supreme Court of Canada held that section 11 rights "are available to persons prosecuted by the State for public offences involving punitive sanctions, i.e., criminal, quasi-criminal and regulatory offences, either federally or provincially enacted." Thus, even though a minor traffic offence may carry slight consequences, the criminal or quasi-criminal nature of the proceedings would bring it within section 11.

The Court also held that section 11 applies to proceedings which carry a true penal consequence. The possibility of a year of imprisonment for officers found guilty of a major service offence in R.C.M.P. Service Court was held to attract section 11 guarantees, even though the proceedings were found to be disciplinary rather than criminal or quasi-criminal in nature.

2. Informed of Specific Offence - Section 11(a)

The courts have interpreted "the right to be informed without unreasonable delay of the specific offence" as arising when the information is laid; that is, when the person is

"charged with the offence." It has also been held that this section does not offend the right to lay alternate charges.

An example of the operation of this subsection can be seen in the *Ryan case*, in which the court quashed an information laid two months after the accused had received an appearance notice. The courts have interpreted the phrase "informed ... of the specific offence" pragmatically, as implying the right to be informed of the substantive offence and the acts or conduct that allegedly form the basis of the charge.

3. Tried Within a Reasonable Time - Section 11(b)

In the 18 October 1990 *Askov* decision of the Supreme Court of Canada, Mr. Justice Cory, for the unanimous Court, held that the right to be tried within a reasonable time, like other specific section 11 guarantees, is primarily concerned with an aspect of fundamental justice guaranteed by section 7. The primary aim of section 11(b), he said, is to protect the individual's rights and to protect fundamental justice for the accused. There is a need to treat those on trial fairly and justly. There is also a practical benefit to be derived from resolving charges quickly since memories fade with time and witnesses may move, become ill or die. Victims of crime also have an interest in whether or not criminal trials take place within a reasonable time.

Mr. Justice Cory argued that the failure of the criminal justice system to work "fairly, efficiently and with reasonable dispatch ... inevitably leads to community frustration with the judicial system and eventually to a feeling of contempt for Court procedures." The judge went on to say that in determining whether the delay in bringing the accused to trial has been unreasonable, the court should consider a number of factors, such as: (1) the length of the delay; (2) the explanation for the delay; (3) the accused's waiver of the right to be tried expeditiously (i.e. through requests for, or agreement with, adjournments or failure to demand as early a date as possible for trial); and (4) prejudice to the accused. The longer the delay, the more difficult it should be for a court to excuse it and "very lengthy delays may be such that they cannot be justified for any reason." Those delays that will weigh in favour of the accused, he continued, are those attributable to the Crown or to systemic or institutional delays; in complex cases, longer delays will, to a point, be acceptable.

Mr. Justice Cory held that when considering delays occasioned by inadequate institutional resources - essentially the reason for the two-year trial delay in *Askov* - the court may compare the jurisdiction in question (i.e. Ontario) with other, "better" jurisdictions in the rest of the country. In all cases, the Crown will have the burden of showing that the institutional delay in question is justified. A waiver of rights by the accused will justify delay, but, to be valid, such a waiver must be informed, unequivocal and freely given.

The *Askov* decision has generated considerable confusion in Canadian criminal courts. From the date of the decision until 12 April 1991, more than 34,495 charges in Ontario alone were stayed, dismissed or withdrawn on the basis of the judgment. This appears to have had a serious impact on the public's confidence in the administration of justice. Mr. Justice Cory, who wrote the judgment, was so "shocked" by its effects that he told a legal conference that the Court had not been made aware of the potential impact of the decision at the hearing. He suggested that the ruling may have been misinterpreted by lower courts and defence counsel.

In order to ensure that the *Askov* decision was "properly understood and applied throughout Ontario," the Ontario Court of Appeal heard and determined six special cases. In *R.* v. *Bennett*, the lead case, the Court concluded that a large number of cases had been stayed because *Askov* had been erroneously interpreted as meaning that a systemic delay beyond six to eight months in bringing an accused to trial should automatically result in a stay or dismissal of charges. The Court of Appeal held that the assessment of the delay should not be reduced to a simplistic computation of time; courts must carefully balance the four factors noted above. Further, the case puts a heavy burden on defendants to submit "sophisticated" statistical information concerning systemic delay in particular jurisdictions in support of their motions for a stay. These conclusions will undoubtedly significantly reduce the number of charges stayed and withdrawn on the basis of section 11(b).

In the subsequent case of *R.* v. *Morin*, in an appeal from the Ontario Court of Appeal, the Supreme Court of Canada was asked to consider whether delay caused by systemic factors could be excused during a transition period of reform aimed at providing trials within a reasonable time. On 26 March 1992, the majority held that an institutional delay of approximately 12 months was not unreasonable, given the absence of any significant prejudice

to the accused and the strain on institutional resources brought about by a 70% increase in adult court caseloads over a five-year period in the district in question.

The Supreme Court of Canada has also held that persons charged with an offence "in the context of s. 11(b) of the Charter" includes corporations. In *R.* v. *CIP Inc.*, however, the Court found that a corporation could not rely on a presumption of prejudice arising out of excessive delay; that presumption is based on an accused's rights as an individual to liberty and security of the person (section 7) and these rights do not extend to corporations. Instead, an accused corporation would have to establish that its fair trial interest had been "irremediably prejudiced." Because the appellant in this instance had not argued that its ability to make full answer and defence had been impaired, the Court dismissed the appeal, holding that the initial charge ought not to be stayed.

In *R.* v. *Kalanj*, the Supreme Court of Canada held that s. 11 (b) does not apply to pre-charge delay since the accused were not "persons charged" until a formal charge had been laid. In *R.* v. *L. (W.K.)*, the Supreme Court applied that judgment "to rule out review of precharge delay unless the accused can establish a breach under s.7."

In *R.* v. *Potvin*, the Supreme Court of Canada was subsequently called on to consider the application of s. 11 (b) to appellate delays. A six to three majority of the court held that s. 11 (b) does not apply in respect of an appeal from conviction by the accused or from an acquittal or stay by the Crown. Their reasoning was that the term "any person charged" does not, as a general rule, include an accused person who is party to an appeal. The court also said, however, that the criminal appellant or respondent is not without a remedy if delay of the appeal process affects the fairness of the trial; as a principle of fundamental justice enshrined in s. 7, the court has the power to remedy such an abuse of process.

4. Right Not to be a Compellable Witness Against Oneself - Section 11(c)

This section is worded widely and on this basis, Professor Martin Friedland argues that it may prevent the enactment of a law compelling the accused to give evidence at a preliminary hearing and to give evidence to a police officer.

An Ontario Court of Appeal decision in the *Crooks* case indicates that this paragraph does not prevent the Crown from calling, as a witness on a preliminary inquiry, an accused separately charged with the same offence.

The Quebec Court of Appeal considered the issue in *R.* v. *Zurlo*, where the accused and his wife were each separately charged and compelled to testify at the other's preliminary inquiry. At a subsequent joint trial, the accused was prevented from cross-examining his wife and denied a motion for a separate trial. Concluding that the couple had been separately charged for the sole purpose of circumventing their right to silence, the Court set aside the conviction and entered a stay of proceedings, finding that the accused had been denied the right to a fair trial.

It should also be noted that this section has been interpreted as not impinging upon the taking of breath samples. In the *Stasiuk* case, it was decided that "the privilege against self-incrimination is a limited one which applies to an accused *qua* witness and is restricted to a testimonial compulsion. A breath test is not in the nature of a statement or a testimonial utterance."

In *Caisse Populaire Laurier d'Ottawa Ltée* v. *Guertin et al.*, a civil remedy was sought while there were outstanding criminal charges connected with the same situation. It was decided that section 11(c) of the Charter does not mean that a person who chooses to defend a civil action is not compellable in a civil proceeding arising from facts that are the subject of simultaneous criminal proceedings. The Ontario High Court added that neither section 11(c) nor section 13 of the Charter gave "any hint of support for the proposition" that the privilege against self-incrimination includes an individual's right to remain silent in parallel civil proceedings.

5. Presumption of Innocence - Section 11(d)

This section is composed of several elements, of which the presumption of innocence has been the one most considered in the case law. A major issue has been the constitutionality of statutes with a "reverse onus" clause requiring the accused to disprove an element of the offence or to prove an excuse or the existence of a fact that will avoid conviction. The Supreme Court of Canada has considered this issue in several cases (beginning with *R.* v. *Oakes* and, more recently, in *R.* v. *Whyte*, *R.* v. *Keegstra* and *R.* v. *Chaulk*), in which it was

held that such clauses violate section 11(d). Where an onus is put on the accused to prove something in order to escape conviction, the general presumption of innocence in the criminal law is effectively displaced by a presumption of guilt. The Supreme Court, in *Whyte* and *Keegstra*, ruled that such clauses are unconstitutional because they raise the possibility that the accused might be convicted in spite of the existence of a reasonable doubt; that is, the accused might fail to prove the existence of the exonerating element, which may, in fact, exist.

While the statutes in question may abridge the section 11(d) right, they may still be upheld as a reasonable limitation of that right pursuant to section 1, where the legislature or Parliament has a legitimate objective for the limitation.

In *Keegstra*, the Court considered the hate propaganda provisions of the *Criminal Code*. A majority held that section 11(d) was violated by the provision exonerating the accused from liability where he or she proves that the impugned statements were true. Nevertheless, the provision was held to be a reasonable limitation under section 1 because otherwise the Crown would have had to prove the falsity of the accused's statements beyond a reasonable doubt. This would have excused much of the "harmful expressive activity."

Likewise, in *Chaulk*, a majority held that section 11(d) was violated by the provision of the *Criminal Code* that raises a presumption of sanity, thereby requiring the accused to prove insanity on the balance of probabilities in order to raise the insanity defence. A majority held that this provision was a reasonable limitation on section 11(d) because the alternative - requiring the Crown to disprove insanity - would be unduly onerous.

In *R.* v. *Downey*, the Supreme Court of Canada considered section 195(2) (now section 212(3)) of the *Criminal Code*, which provides that "evidence that a person lives with or is habitually in the company of a prostitute...is, in the absence of evidence to the contrary, proof that the person lives on the avails of prostitution." According to *Criminal Code* section 212(1)(j), living "wholly or in part on the avails of prostitution of another person" is an indictable offence carrying a maximum penalty of 10 years' imprisonment. All seven judges who heard the case agreed that the impugned section infringed the accused's right to be presumed innocent (section 11(d)). A majority of four, however, held that such infringement was a reasonable limit under section 1 of the *Charter of Rights and Freedoms*; the objective of addressing the "cruel and pervasive social evil" of exploitation by pimps was sufficiently

important to warrant overriding a Charter right. Furthermore, the Charter limitation was proportionate to the legislative objective, given "the reluctance of prostitutes to testify against pimps" and the fact that the innocent "need only point to evidence capable of raising a reasonable doubt" on the issue in order to avoid conviction.

In *R.* v. *Osolin*, the Supreme Court of Canada was called upon to consider whether section 265(4) of the *Criminal Code* had infringed the appellant's right to be presumed innocent in his trial for sexual assault. Section 265(4) codifies the defence of mistaken belief in consent; it has long been interpreted as requiring the accused to provide sufficient evidence, in support of his or her claim of an honestly held belief in consent, to impart an "air of reality" to the defence. The accused's bare assertion of a mistaken belief in consent, would not on its own be enough to enable or oblige a trial judge to put the defence of mistaken belief to the jury. The appellant in *R.* v. *Osolin* argued that the evidentiary burden imposed by section 265(4) infringed his right to be presumed innocent. Because the trial judge had refused to charge the jury with respect to the defence of mistaken belief in consent, the appellant also argued that the "air of reality" threshold operated to deny him of his right to trial by jury under section 11(f) of the Charter.

In rejecting both arguments, Mr. Justice Cory found that "the mere fact of the air of reality requirement does not displace the presumption of innocence." Although it does place an evidentiary burden on the accused to "raise sufficient evidence to give the defence an air of reality to justify its presentation to the jury, the burden of proving all of the elements of the offence beyond a reasonable doubt rests squarely with the Crown." Furthermore, there was no violation of the appellant's right to trial by jury since the sufficiency of evidence in such a case is a question of law and "therefore is properly in the domain of the judge."

In *R.* v. *Ellis-Don Ltd.*, the Ontario Court of Appeal declared unconstitutional the due diligence defence as applied to a provincial regulatory offence. The case concerned a section of the *Occupational Health and Safety Act* requiring the general contractor of a project to ensure that safety measures are followed. Both the statute and the common law provided a defence of due diligence, which required an accused to prove on a balance of probabilities that he or she had taken all reasonable measures to avoid an accident. Unless this was done, the Court was required to convict the accused, even though it had a reasonable doubt about guilt.

In its section 1 analysis, the Court of Appeal held that the provision did not violate section 11(d) to the minimum extent possible.

R. v. *Ellis Don Ltd.* was subsequently reversed by the Supreme Court of Canada, relying on its reasoning in *The Wholesale Travel Group Inc.* v. *The Queen.* In that 1991 decision, the Court had upheld reverse onus provisions in the *Competition Act* by a five to four majority; two of the five had held that requiring an accused to establish due diligence on a balance of probabilities did not infringe section 11(d), while the remaining three found that the provision did so, but was justified under section 1 of the *Charter of Rights and Freedoms*.

6. Fair Hearing - Independent and Impartial Tribunal

The Supreme Court of Canada ruled in the *Corbett* case that allowing prior criminal convictions into evidence does not deprive an accused of the right to a fair trial under section 11 of the Charter. The section of the *Canada Evidence Act* that allows this permits an accused who is testifying on his or her own behalf to be cross-examined with respect to prior convictions. The rationale is that prior convictions can bear on the witness's credibility.

In the *Vermette* case, the Supreme Court held that statements in the National Assembly by the Premier of Quebec had not necessarily resulted in the denial of the accused's right to a fair trial due to bias in the jury. The existence of such bias would have to be determined at the time of jury selection, but statements by politicians could not frustrate the whole criminal process.

In *R.* v. *Valente*, the Supreme Court considered that trial by an independent and impartial tribunal requires the tribunal's individual independence (as reflected in security of tenure and financial security) and institutional independence (as reflected in its administrative relationship to the legislative or executive branches of government). The tribunal must not only enjoy these characteristics but must be perceived to do so.

The Court Martial Appeal Court of Canada has applied the *Valente* tests for independence to both Standing and General Courts Martial. In *R.* v. *Ingebrigtson*, the Court found that Standing Courts Martial presidents lacked financial independence because the Chief of Defence Staff had authority to fix their salaries on the basis of merit. Conversely, in *R.* v.

Généreux, General Courts Martial tribunals, appointed ad hoc for a single case, were found to be independent because their members had no reason to fear any loss of salary or rank.

On 13 February 1992, the Supreme Court of Canada overturned the decision in *R.* v. *Généreux* and ordered a new trial on the basis that the structure of the General Court Martial had infringed the accused's right to be tried by an independent and impartial tribunal as guaranteed by section 11(d) of the *Charter of Rights and Freedoms*. Of the majority of eight, five judges found that the procedure for appointment and evaluation of judge advocates had failed to meet the tests for security of tenure or financial security set out in *Valente*. Furthermore, aspects of the system had also cast doubt on the institutional independence of General Courts Martial. Because it could not be claimed that the accused's section 11(d) rights had been impaired as little as possible, there could be no justification under section 1. At the same time, the Court indicated that recent amendments to the *Queen's Regulations and Orders for the Canadian Forces* had effectively alleviated the deficiencies relating to security of tenure and financial security.

On 6 May 1992, Bill C-77, An Act to amend the National Defence Act was passed by the House of Commons after consideration by Committee of the Whole. The bill contained provisions to alleviate the apparent lack of institutional independence identified by the Supreme Court in *Généreux*. Under amendments to the Act, the prosecutor and members of the court martial who serve as triers of fact will no longer both be appointed by the same convening authority; instead, the president and other members will be appointed by an officer designated by regulation. Prior to the Supreme Court decision in *Généreux*, authority to appoint judge advocates had been removed from the Judge Advocate General (an agent of the executive) and given to the Chief Military Trial Judge, a step that had addressed the Court's other serious reservation concerning the lack of institutional independence.

Even though allegations of bias or partiality are usually assessed on an individual case-by-case basis, the objective status of a tribunal may be relevant to impartiality just as it is to independence. When discussing the section 11(d) requirement for impartiality, in *R.* v. *Lippé*, the Supreme Court of Canada accepted that a reasonable apprehension of bias could arise on an institutional or structural level. For example, the Court found that the practice of law by some part-time Municipal Court judges raised a reasonable apprehension of bias. However, that

apprehension had been alleviated by various safeguards which had been implemented to address the issue.

On 23 January 1992, a four to three majority of the Supreme Court of Canada found *Criminal Code* sections 634(1) and (2) inconsistent with section 11(d) of the *Charter of Rights and Freedoms*, insofar as they provided the Crown in the jury selection process with a combination of peremptory challenges and standbys that exceeded the number of peremptory challenges available to an accused. Under the impugned *Criminal Code* provisions, the prosecutor was entitled not only to challenge four jurors peremptorily, but also to direct as many as 48 to stand by. In contrast, the accused was entitled to 20, 12 or four peremptory challenges, depending upon the nature of the charge or the maximum penalty available. Writing for three of the majority in *R.* v. *Bain*, Mr. Justice Cory found that the prosecutor's "overwhelming numerical superiority of choice," in the jury selection process, would give the reasonable person an apprehension of bias. Likewise, Mr. Justice Stevenson held that the Crown's "substantial advantage in the ability to shape and fashion the jury" severely impaired the appearance of fairness and impartiality. The Court found that the legislation could not be justified under section 1, but "suspended" a declaration of invalidity for a period of six months in order to give Parliament an opportunity to enact new legislation.

Bill C-70 was introduced on 6 April 1992 to fill the void created by the decision in *R.* v. *Bain*. In addition to abolishing the Crown's right to "stand by" prospective jurors, Bill C-70 gave the Crown and the accused an equal number of peremptory challenges and changed the order in which they would be declared. The bill also repealed provisions allowing a jury of only six persons in the Yukon and Northwest Territories and codified aspects of jury selection previously endorsed by the courts. The existing procedure on challenges for cause remained unchanged.

7. Reasonable Bail - section 11(e)

Ordinarily, the *Criminal Code* requires the prosecution to justify the detention of an accused, pending trial. Bail will be granted unless the Crown establishes that detention is necessary, either to ensure the accused's attendance in court, or in the public interest. In *R.* v. *Bray*, the Ontario Court of Appeal held that *Criminal Code* provisions requiring an accused

murderer to show that his detention in custody is not justified do not infringe section 11(e) and that even if they did, the infringement would be justified as a reasonable limit under section 1 of the Charter. Conversely, in *R.* v. *Pearson*, the Quebec Court of Appeal struck down *Criminal Code* provisions that require persons accused of importing or trafficking under the *Narcotic Control Act*, to be detained in custody unless they show cause why such detention is not justified. While acknowledging that the struggle against drug trafficking is a sufficiently important objective to justify overriding a constitutional right, the Court of Appeal found that the law failed the proportionality test because it was discriminatory and arbitrary and did not constitute a minimum impairment of Charter rights.

The *Pearson* decision was subsequently overturned by a majority of the Supreme Court of Canada, who found that section 515(6)(d) of the *Criminal Code* does not infringe an accused's right to reasonable bail. The Court accepted that the lucrative nature of drug trafficking and importation can create incentives to continue criminal behaviour after arrest and, furthermore, that traffickers and importers may pose a greater risk than other accused of absconding before trial. The Court also noted that denial of bail under section 515(6)(d) applies only in a narrow set of circumstances, "is necessary to promote the proper functioning of the bail system and is not undertaken for any purpose extraneous to the bail system." Although section 515(6)(d) would result in denial of bail in certain circumstances, the majority held that it also provides "just cause" for such denial and, thus, does not infringe section 11(e) of the Charter.

In the companion case of *R.* v. *Morales*, the Supreme Court of Canada upheld parallel *Criminal Code* provisions placing the onus on the accused to demonstrate that detention is not justified, when charged with an indictable offence allegedly committed while released on bail. In reaching that decision, the Court pointed out that bail is granted "on condition that the accused will cease criminal behaviour"; section 515(6)(a) "establishes a set of special bail rules where there are reasonable grounds to believe that the accused has already breached this condition." Since the provision is "narrow and carefully tailored to achieve a properly functioning bail system," it constitutes "just cause" to deny bail and does not violate section 11(e) of the Charter.

The *Morales* case also involved a challenge to the validity of *Criminal Code* section 515(10)(b) grounds for detaining an accused in custody. Under that provision, an accused could be held in custody on the grounds that detention is "necessary in the public interest," or "for the protection or safety of the public, having regard to all the circumstances, including any substantial likelihood that the accused will, if he is released from custody, commit a criminal offence or interfere with the administration of justice." Although the Court had no trouble upholding the "public safety" reasons, the "public interest" criterion was struck down for being too vague and imprecise to constitute just cause for denial of bail within the meaning of section 11(e) of the Charter. The majority found that the term gave the courts "unrestricted latitude to define any circumstances as sufficient to justify pre-trial detention."

Although preventing offences or interference with the administration of justice are sufficiently pressing objectives, the resulting limitation on section 11(e) could not be justified under section 1 of the Charter; there was no rational connection between the objectives and the legislative measure, there was more than a minimal impairment of rights and the effects of the limit far exceeded the objectives of the law. In order to minimize the Court's interference with the legislative function, the offending words "in the public interest or" were severed and struck down, allowing the remaining constitutionally valid portion of section 515(10)(b) to stand.

8. Right to Trial by Judge and Jury - Section 11(f)

In the *Lee* case, the Supreme Court of Canada ruled upon the constitutionality of the provision in the *Criminal Code* that denies a jury trial to an accused person who would otherwise be entitled to one but who, for no good reason, fails to attend for trial or to remain there once the trial has begun. The Court, in holding that the provision is not unconstitutional, said that the Code provision went beyond merely punishing the accused who fails to appear or to remain for his jury trial. It had been enacted for the valid legislative purpose of protecting "the administration of justice from delay, inconvenience, expense and abuse, and to secure the respect of the public for the criminal trial process." As the challenged Code section impairs the right to a jury trial "as little as possible in order to achieve that legislative objective," it is, therefore, "proportionate to the objective of maintaining respect for the system."

9. Right Not to be Tried Twice for the Same Offence - Section 11(h)

In the *Van Rassel* case, the accused was an R.C.M.P. officer and member of an international drug enforcement team. He was arrested in Florida and charged in the U.S. with soliciting and accepting bribes in exchange for information given to him by the American authorities. He was acquitted at trial but was subsequently charged in Canada with breach of trust under the *Criminal Code*.

The Supreme Court of Canada said that the Charter provision "applies only in circumstances where the two offences with which an accused is charged are the same." Since these two offences related to different activities, they were not the same and it was not objectionable, therefore, for the accused to be prosecuted in Canada after being acquitted in the U.S.

Section 11(h) has a common origin with the long-established defences of "autrefois acquit" and "autrefois convict," "issue estoppel" and the rule enunciated by the Supreme Court in 1975 in the *Kienapple* case. The defences, or pleas, of autrefois acquit and autrefois convict are contained in the *Criminal Code*. In order for either defence to succeed the accused must show that the current matter and the one of which he or she was previously acquitted or convicted are the same; the new charge must be the same as the charge at the first trial, or have been included implicitly in that charge. The charges need not be absolutely identical; all that must be shown is that the accused could have been convicted of the current charge at the first trial.

The defence of issue estoppel is based on the principle that a court should not rule on an issue that has already been decided by another court. This principle was recognized by the Supreme Court of Canada in the *Gushue* case.

The rule in the *Kienapple* case provides that a conviction cannot be registered on the second charge if there has been a conviction on a first charge arising out of the same cause. Thus, in a shoplifting case where a person is charged simultaneously with one charge of theft and one of possession of stolen goods, a conviction may be entered on only one or the other where the same goods form the subject of both charges. This is true as well where a person whose breathalyser reading exceeds the legal limit is charged with both exceeding the legal limit

and impaired driving. This principle was most recently reviewed by the Supreme Court of Canada in its decision in the *Prince* case, where the Court held that the rule does not apply where there is more than one victim, even if the same facts apply.

In *Shubley* v. *The Queen*, the Supreme Court of Canada held that a finding of guilt in prison disciplinary proceedings does not preclude a subsequent prosecution for the same action under the *Criminal Code*. Since the disciplinary proceedings carried no real penal consequences and were not meant to account to society for crimes against the public interest, section 11(h) would not apply.

Similarly, criminal prosecution for assault, following conviction for a "major service offence" under the *Royal Canadian Mounted Police Act*, does not offend section 11(h) because the "offences" involved are not the same. In *R.* v. *Wigglesworth*, the Supreme Court of Canada found that an R.C.M.P. officer could be answerable to both his profession and to society at large, for the same act or conduct. Notwithstanding possible penal consequences, a conviction in service court would not answer the criminal charge of assault.

C. Cruel and Unusual Treatment or Punishment: Section 12

Section 12 states:

> Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

While this section has not been used to set aside the dangerous offender sections of the *Criminal Code* as unconstitutional, it has provided the courts with an opportunity to review indeterminate sentencing under the *Criminal Code*. In *Re Mitchell* and the *Queen*, Mr. Justice Allan Linden of the Ontario Supreme Court held that indefinitely detaining someone who is not a menace to society would be cruel and unusual treatment or punishment, in violation of the *Charter of Rights and Freedoms*." However, where it could be shown that the accused posed a real danger to other persons if his behaviour was not restrained, section 12 of the Charter would not be violated.

In the *Mitchell* case, in attempting to devise a standard that could be applied when determining whether treatment or punishment was cruel and unusual, the Ontario Supreme Court

found that the treatment or punishment would have to be so excessive as to outrage standards of decency and surpass all rational bounds of treatment or punishment. "The test is one of disproportionality: is the treatment or punishment disproportionate to the offence and the offender? Evidence that the treatment or punishment is unusually severe and excessive in the sense of not serving a valid penal purpose more effectively than a less severe treatment or punishment will suffice to satisfy the test of disproportionality."

This test was further subdivided and amplified in the *Soenan* case, which dealt with the complaints of a prisoner in pre-trial custody. The court here defined the meaning of "cruel and unusual treatment." It determined that the relevant factors are whether the treatment is in accordance with public standards of decency and propriety; whether it is unnecessary because of the existence of adequate alternatives; and whether or not it can be applied upon a rational basis and in accordance with ascertained or ascertainable standards. Using these tests and applying some new ones (such as "does the treatment have a social purpose and can it be applied upon a rational basis in accordance with ascertainable standards?") the Federal Court, Trial Division, in the *Belliveau (No. 2)* case held that the mandatory supervision program does not authorize cruel and unusual treatment or punishment.

In the *Smith* case, the Supreme Court of Canada was called upon to decide whether the mandatory seven-year minimum sentence for importing narcotics, contrary to section 5(2) of the *Narcotic Control Act*, breached this section of the Charter. The Court, with one dissenting judgment, held that the section did breach section 12 and was not justified under section 1 as a reasonable limit.

The fact that the purpose of the legislation, to deter the drug trade and punish importers of drugs, was clearly valid did not prevent the Court from ruling on the validity of the section. Mr. Justice Lamer (writing also for Chief Justice Dickson) discussed the Charter limits on "treatment or punishment." He said that it is generally accepted in a society such as ours that the state has the power to impose a "treatment or punishment" on an individual where it is necessary to do so to attain some legitimate end and where the requisite procedure has been followed.

The protection in section 12 governs the quality of punishment, and its effect on the person. The words "cruel and unusual" are to be read together as a "compendious

expression of a norm." The criterion to be applied is "whether the punishment prescribed is so excessive as to outrage standards of decency"; the effect of punishment must not be grossly disproportionate to what would have been appropriate. This reasoning is very similar to that found in the *Mitchell* case.

In assessing whether a sentence is grossly disproportionate, the court must first consider the gravity of the offence, the personal characteristics of the offender and the particular circumstances of the case in order to determine what range of sentences would have been appropriate to punish, rehabilitate or deter this particular offender or to protect the public from him or her. The other goals that may be pursued by imposing punishment, in particular the deterrence of other potential offenders, are thus not relevant at this stage of the inquiry. This does not mean that in determining a sentence the judge or the legislator can no longer consider general deterrence or other penological purposes that go beyond the particular offender; it means only that the resulting sentence must not be grossly disproportionate to what that offender deserves.

Noting that there was no suggestion that the eight-year sentence imposed on this appellant was cruel and unusual, Lamer J. went on to find that a seven-year minimum prison term was, nevertheless, disproportionate "in light of the wide net cast by s. 5(1)." Because both the offence of importing and the mandatory minimum sentence totally disregarded the quantity of drugs involved, the purpose of importation and the existence or absence of previous convictions of a similar nature, the court found that it was inevitable that, in some cases, a verdict of guilt would lead to the imposition of a "grossly disproportionate" term of imprisonment. Although the legislative objective was sufficient to warrant overriding a constitutionally protected right, the means chosen were not proportionate since there was no need to sentence "small offenders" to seven years in order to deter the serious offender. Therefore, the legislation could not be justified as a reasonable limit under s. 1 of the Charter.

On 14 November 1991, the Supreme Court of Canada held that a mandatory minimum seven-day jail term for driving while suspended did not offend section 12. The facts of the particular case involved a provision of the *Motor Vehicle Act*, R.S.B.C. 1979, c. 288, which allowed the superintendent of motor vehicles to prohibit persons with an unsatisfactory driving record from driving a motor vehicle. Conceding its obligation to examine the statutory

provision in light of reasonable hypothetical circumstances, the Court nevertheless maintained that it did not have a licence to invalidate "on the basis of remote or extreme examples." However, the six to three majority decision in *R.* v. *Goltz* left open the possibility of a different result if the mandatory jail term were imposed for driving while suspended for administrative infractions or other reasons of a "relatively minor nature," as also contemplated under the Act.

Relying on the Supreme Court of Canada's reasoning in *Smith* and *Goltz*, the Manitoba Court of Appeal has subsequently held a portion of section 85 of the *Criminal Code* to be of no force and effect because it infringes s. 12. Section 85 mandates both minimum and consecutive sentences for the use of firearms during the commission of an indictable offence. In *R.* v. *Brown*, the defence had conceded that the 13-year sentence imposed "for these offences and this offender" did not result in a *prima facia* determination that his s. 12 rights had been breached. However, the wording of s. 85 is "broad enough to include what has been described as the small or innocent offender," and the Court held that it could result in a violation of s. 12 of the Charter in such a case. Since it was the requirement that "jail terms be imposed and that they be served consecutively both to the sentences imposed on the indictable offence or offences and to each other that results in the violation of s. 12," the Court chose to delete the words "or series of events" in s. 85(2). Thus, only the requirement that sentences imposed for a series of firearms offences be served consecutively to each other was removed.

In *Lyons* v. *The Queen*, the Supreme Court has held that imposition of an indeterminate sentence, upon finding that an accused is a "dangerous offender," does not offend the protection against cruel and unusual punishment because of the availability of parole. However, in *Warden of Mountain Institution* v. *Steele*, the Supreme Court later held that section 12 could be violated where misapplication or disregard of review criteria (for dangerous offenders) resulted in a period of incarceration far beyond the time when an offender should have been paroled. In that case, the National Parole Board was found to have erred in the application of criteria for release.

In *Kindler* v. *Canada (Minister of Justice)*, a majority of the Supreme Court held that extraditing fugitives to countries where the death penalty might be imposed did not offend the Charter, but three dissenting judges argued that imposition of the death penalty would constitute a violation of section 12.

In the subsequent case of *Chiarelli* v. *Canada (Minister of Employment and Immigration)*, the Supreme Court of Canada examined *Immigration Act* provisions calling for the deportation of non-citizens convicted of an offence punishable by a period of imprisonment of five years or more. The Court held that although it might be considered a "treatment," deportation of "a permanent resident who has deliberately violated an essential condition of his or her being permitted to remain in Canada...., cannot be said to outrage standards of decency" and would not constitute cruel and unusual treatment or punishment.

Other cases dealing with the application of this section have concentrated mainly on such matters as solitary confinement and the double-celling of inmates in penitentiaries.

D. Self-Incrimination: Section 13

This section provides that:

> A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

This is similar to section 5(1) of the *Canada Evidence Act* with one important exception: the Act contemplates that an objection must be made by the witness, whereas the Charter does not. Also the Charter allows a later prosecution for the giving of contradictory evidence (evidence dissimilar to that previously given) as well as for perjury. This change was necessary because the *Canada Evidence Act* has been interpreted as not encompassing a contradictory evidence charge within the word "perjury."

Section 13, which is obviously linked to section 11(c), affords protection against testimonial compulsion. This protection is better than that which existed before the Charter came into force, in that the witness no longer needs expressly to claim protection in order to receive it; however, there is no absolute right to refuse to answer questions. This was the position taken in the *Thomson Newspapers Ltd.* case, where the Supreme of Canada Court upheld the authority of the Restrictive Trade Practices Commission to examine under oath representatives of corporations suspected of violating the federal *Combines Investigation Act*. Since this was an "inquisitorial" (rather than an "adversarial") proceeding, so that no final

determination as to criminal liability was reached, there was no absolute right to refuse to answer questions. Otherwise, there would be a "dangerous and unnecessary imbalance between the rights of the individual and the community's legitimate interest in discovering the truth about the existence of practices against which the Act was designed to protect the public". In any case, said the Court, the individual's right to prevent the subsequent use of compelled self-incriminatory testimony continues unchanged by this requirement; hence, the individual's rights and those of the state are kept in proper balance.

An interesting situation developed in the *Dubois* case, where the Alberta Court of Appeal held that the Crown, in an attempt to incriminate an individual who had successfully appealed a conviction, could use the first-trial testimony of the individual in a new trial ordered by the Court of Appeal. It was determined that the second trial of an accused for the same offence is not an "other proceeding" within the meaning of this section; therefore the previous testimony can be used. The Supreme Court of Canada reversed the decision of the Alberta Court of Appeal in this case, however; it determined that an accused's incriminating testimony given in the initial trial could not be used against him in a subsequent retrial ordered by the Court of Appeal. The Supreme Court also felt that allowing the prosecution to use the accused's previous testimony would amount to compelling the accused to testify, thus contradicting the right to remain silent and to be presumed innocent. However, the Court did not say whether it would rule out the use of previous testimony during cross-examination in the re-trial.

This issue was resolved in two later decisions. In *R.* v. *Mannion*, the Supreme Court held section 13 was violated when the accused's testimony from a prior trial was used in cross-examination to contradict the accused's testimony, and thereby establish guilt. In the *Kuldip* case, however, the Supreme Court held that the use of such testimony in cross-examination in order to attack the accused's credibility was not contrary to section 13; in such a case the testimony is not specifically used to "incriminate" the accused, but only to undermine the truth of the accused's testimony.

PARLIAMENTARY ACTION

A. Bill C-70: An Act to amend the Criminal Code (Jury) S.C. 1992, c. 41

This statute abolished the Crown's right to stand by prospective jurors. It also granted the Crown and the accused an equal number of peremptory challenges and changed the order in which they are declared.

B. Bill C-77: An Act to amend the National Defence Act, S.C. 1992, c. 16

This statute changed the process for appointing the president and other members of a court martial. It also gave the president authority to exclude the public from a trial or part of a trial and granted the judge advocate authority to determine questions of law or mixed law and fact.

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